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In the Supreme Court of the United States

OCTOBER TERM, 1979

BIRMINGHAM TRUST NATIONAL BANK, PETITIONER

v.

JACK H. HARRISON, ET AL.

JACK H. HARRISON, PETITIONER

v.

BIRMINGHAM TRUST NATIONAL BANK, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Comptroller of the Currency's appraisal of the value of national bank stock held in trust precludes a state court from awarding damages (in-

cremental to a payment for the stock in the amount calculated in the Comptroller's appraisal) based on a bank trustee's breach of fiduciary duty to the trust in connection with the appraisal (BTNB Pet.).

2. Whether the state court erred in failing to give effect to the trust's claims of violation of federal banking law and federal securities law in determining whether the bank trustee breached its fiduciary duty under state law (Harrison Pet.).

STATEMENT

1. The present litigation arises from a dispute between the two co-trustees of a testamentary charitable trust, known as the Linn-Henley Charitable Trust (Trust). Petitioner Birmingham Trust National Bank (BTNB) is the corporate trustee; John C. Henley, III is the co-trustee. The Trust owned a substantial block of BTNB stock that amounted to approximately 50% of the assets of the Trust (BTNB Pet. App. 29, 67).

In 1968, BTNB decided to reorganize the bank for the purpose of forming a one-bank holding company. Shareholder proxies were solicited for approval of the plan. The proxy materials described the reorganization as falling within the statutory merger provisions of the National Bank Act, but omitted any reference to the appraisal rights of dissenting shareholders. No registration statement under the Securities Act of 1933 was filed for the holding company stock offered in exchange for the shares of the bank.[1] The shareholders subsequently approved the reorganization, although Henley voted the

[1]Apparently no registration statement was filed in reliance on the exclusion from the Securities Act registration requirements provided under former Commission Rule 133, 17 C.F.R. 230.133, for certain statutory mergers. See *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 465-466 (1969).

Trust shares against the transaction. The Comptroller of the Currency (the federal official charged with supervision of national banks) gave his approval of the reorganization and it became effective shortly thereafter (BTNB Pet. App. 30).

Henley informed BTNB of his view that the Trust should dissent from the merger (BTNB Pet. App. 69).[2] However, the co-trustees were unable to agree that this action was in the best interests of the Trust. Neither trustee petitioned the Alabama courts for instructions as to what steps to take to protect the Trust's interests in view of the disagreement concerning the reorganization (*id.* at 73-74).[3] Moreover, neither trustee invoked the statutory appraisal remedy under 12 U.S.C. 215a(c) or (d) (*id.* at 31, 70-71). Nine months after the effective date

[2]The rights of dissenting stockholders are set forth in 12 U.S.C. 215a. Basically the dissent procedure calls for surrender of the stockholder's shares followed by an appraisal to determine their value. There is a provision for the parties to appoint appraisers but, if the appraisal is not completed within 90 days, either party may request the Comptroller to appraise the stock surrendered by the dissenter. The statute provides that the Comptroller's appraisal shall be final and binding on all parties. The national bank that survives the merger is required to pay dissenters for their stock at the appraised value. The final step in the dissent process requires the surviving national bank to sell at public auction the stock that would have been delivered to the dissenting stockholders had they not dissented. The surviving bank is permitted to buy the stock offered at this auction but, if it does, it must dispose of the stock in some manner within 30 days. If the auction sale of the stock yields more than the appraised value of the shares surrendered, the excess over the appraised value is paid to the dissenters.

[3]The trustee may apply to a court of equity for directions or instructions when a reasonable doubt exists as to the proper administration of a charitable trust. See, *e.g.*, *Gilmer* v. *Gilmer*, 245 Ala. 450, 17 So.2d 529 (1944).

of the reorganization, BTNB agreed that the Trust could exercise its right as a dissenting stockholder and requested the Comptroller to appraise the Trust's shares.

The Comptroller requested financial information needed for the appraisal, which BTNB provided. It withheld, however, additional information that would have improved the accuracy of the appraisal (BTNB Pet. App. 36-38, 48). Henley, who had employed separate counsel for the Trust, asked BTNB to provide internal audits relevant to the appraisal process but, upon BTNB's refusal, did not submit any information to the Comptroller (*id.* at 75-76).

The Comptroller subsequently reported his appraisal, concluding that, at the effective date of the merger, the stock of BTNB had a value of $32.80 per share, resulting in a total value of $900,688 for the 27,460 shares of BTNB stock held in Trust. That sum was paid to the Trust and was accepted by Henley on behalf of the Trust. The BTNB stock was then surrendered by the Trust (BTNB Pet. App. 31).

After making this payment, BTNB proceeded to hold an auction sale as required by 12 U.S.C. 215a(d). With the approval of the Comptroller, the Bank first advertised an auction for 27,460 shares of the holding company stock. No registration statement was filed under the Securities Act prior to the offer and sale of the stock. Shortly before the date of the sale, Henley urged that the stock be purchased on behalf of the Trust. BTNB did not agree to this proposal. The only bidder for the holding company stock was the holding company

itself. It purchased 27,460 shares of its own stock at $26 per share (BTNB Pet. App. 31-32).[4]

2. Following the auctions, Henley asserted various claims that BTNB had violated the law in connection with the reorganization (BTNB Pet. App. 72). In response, BTNB petitioned the Alabama circuit court for instructions and ratification of its prior actions (*ibid.*). Henley counterclaimed in that action, alleging, *inter alia*, that BTNB had breached its fiduciary duty to the Trust in failing to provide the Comptroller with sufficient information upon which to base his appraisal (*id.* at 74-78) and in not conducting a bona fide public auction as required by the National Bank Act (*id.* at 82).

The trial court found no breach of fiduciary duty on the part of BTNB, although it criticized BTNB for failing to petition for instructions prior to taking the challenged actions (BTNB Pet. App. 73-74). Henley appealed to the Supreme Court of Alabama, which reversed the decision of the circuit court. *Henley* v. *Birmingham Trust National Bank*, 295 Ala. 38, 322 So.2d 688 (1975). The court concluded that BTNB had breached its fiduciary duty to the Trust in failing to provide the Comptroller with material information needed for the appraisal. The court rejected BTNB's contention that the Comptroller's appraisal preempted the Trust's claim of breach of

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[4]Uncertain that it had auctioned the right stock, BTNB later held a second auction at which 27,460 shares of "new" BTNB (the surviving bank) stock was sold. Again, the only bid was made by the holding company, this time at $24 per share. Because these were securities issued by a national bank, they were exempt from registration under the Securities Act of 1933. See Section 3(a)(2) of the Act, 15 U.S.C. 77c(a)(2). Since neither auction produced a bid in excess of $32.80 per share, there was no further payment by BTNB to the Trust (BTNB Pet. App. 32).

fiduciary duty under state law (BTNB Pet. App. 76-78). It then remanded the case to the circuit court with directions to make certain findings and an award of damages and specified that a temporary trustee should be appointed for the Trust in lieu of the named trustees.[5]

On remand, the temporary trustee asserted additional claims on behalf of the Trust, including allegations that BTNB had violated the federal securities laws and that such violations should be considered as evidence of BTNB's breach of fiduciary duty (see note 8, *infra*). The trial court made the following award of damages to the Trust:

(1) $703,272, plus interest, based on BTNB's failure to provide information material to the appraisal to the Comptroller of the Currency (BTNB Pet. App. 38-39, 43-44); and

(2) $1,208,240, based on BTNB's refusal to permit the Trust to purchase stock sold at the public auction (*id.* at 41-42, 44).

Both trustees filed a second appeal to the Alabama Supreme Court. The court affirmed the first award and reversed the second. The court upheld the award of damages based on BTNB's actions in connection with the appraisal, reaffirming its prior decision on the question of liability (BTNB Pet. App. 46-48). However, it set aside the award of damages based on BTNB's failure to bid for the holding company's shares on behalf of the Trust (*id.* at 48-52). The court explained that Alabama law precludes a trustee from bidding for its own shares

[5]Cross-petitioner Jack H. Harrison is the temporary trustee of the Trust, having been appointed pursuant to the mandate of the Alabama Supreme Court.

at auctions unless authorized by the settlor of the trust and concluded that BTNB did not abuse its discretion in refusing to buy the holding company's shares as a trust investment (*ibid.*). The court did not mention the federal securities law issues raised by the temporary trustee, disposing of the case under state trust law principles.

DISCUSSION

Both petitions should be denied because the decision of the court below does not present federal questions of sufficient importance to warrant review by this Court.

1. Petitioner BTNB contends (Pet. 12-20) that the Alabama Supreme Court has undermined the Comptroller's appraisal, since it has upheld an award of damages to the Trust that increases the amount of money found to be due by the Comptroller. However, the court below did not purport directly to review the Comptroller's appraisal, and it did not set the appraisal aside (BTNB Pet. App. 46-47). Instead, it awarded damages to the Trust under state trust law principles based on a breach of fiduciary duty. In our view, such an award under state law is entirely appropriate and not foreclosed by the language of the appraisal statute, 12 U.S.C. 215a(d). If the decision were a direct challenge to the Comptroller's appraisal, which is "final and binding on all parties," we would, of course, adopt a different position.[6] We also note that the question presented by petitioner BTNB arises only because a merging bank is also a co-trustee of a trust which, as a shareholder, has

[6]In *Simonds* v. *Guaranty Bank & Trust Co.*, No. 74-1105-K (D. Mass.), the Comptroller is defending a direct challenge to the "final and binding" status of his appraisal. The plaintiff in that case seeks judicial review of the appraisal, which the Comptroller contends is foreclosed by 12 U.S.C. 215a(d).

dissented from the merger. Because the convergence of these facts is unusual, the issue is not likely to be a recurrent one of general importance.

2. Petitioner Harrison challenges (Pet. 20-28) the reversal of the award of damages to the Trust for breach of fiduciary duty stemming from BTNB's refusal to permit the Trust to bid for shares at the public auction. He argues that the Alabama Supreme Court either did not consider or erroneously evaluated his claims of violations of federal banking and securities laws. He also argues that BTNB's merger plan itself was illegal under the federal banking and securities laws.

In our view, however, the court below did not misapply federal law because the Trust's allegations of violation of federal law were merely presented as examples of BTNB's breach of fiduciary duty under state law. See Harrison Pet. 18; Harrison Pet. App. A-59, A-60. Thus, the alleged federal law violations were not raised as separate federal causes of action that the Alabama Supreme Court was required to adjudicate apart from the state law question of breach of fiduciary duty.

In any event, even if petitioner had raised the invalidity of the merger in a separate cause of action, our view would be that the Comptroller's decision approving the bank reorganization was entirely proper. 12 U.S.C. 215a authorizes the triangular or "phantom bank" merger utilized by BTNB. Such a transaction is a corporate reorganization achieved by a merger of two national banks to which the literal terms of the statute apply. The Comptroller's interpretation of the statute is

well established and is reflected in the long-standing administrative practice of chartering new or "phantom" banks to facilitate mergers which result in the formation of one-bank holding companies.[7]

We do not believe that petitioner's federal securities law claims raise questions of sufficient importance to merit review by this Court, even if they were, and properly could be, pleaded as separate causes of action in the Alabama court.[8]

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[7]Indeed, the Comptroller's latest Annual Report shows that 25 national banks were chartered in 1978 pursuant to corporate reorganizations. Comptroller of the Currency, *1978 Annual Report* 12 (Table 5).

Assuming arguendo that the challenge to the merger was raised as a separate cause of action, we note that Henley waited nearly three years to raise it—from November 25, 1968 (when the Comptroller approved the reorganization) to October 6, 1971 (when BTNB filed its petition for ratification and instructions). Such a belated claim might well be barred by laches.

[8]Six securities claims are discussed in the Harrison petition. First, petitioner claims that Section 5 of the Securities Act of 1933, 15 U.S.C. 77e, was violated when shares of the holding company were offered in exchange for shares of "old" BTNB without a registration statement having been filed under the Securities Act of 1933. This claim is premised on the view that the statutory merger provisions of the National Bank Act, 12 U.S.C. 215a, did not apply to the transaction and, therefore, the exclusion from the requirements of Section 5 contained in former Commission Rule 133 (rescinded effective January 1, 1973) was inapplicable (Harrison Pet. 22-23). Second, petitioner claims that the proxy solicitation, falsely stating that the statutory merger provisions of the National Bank Act applied to this merger, violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Commission Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5 (Harrison Pet. 24). Third, petitioner claims that the proxy solicitation violated Section 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78n(a), by omitting Item 9 of Schedule B of the proxy regulations of the Comptroller of the Currency (Harrison Pet. 4). Fourth, petitioner claims that Section 5 of the Securities Act of 1933 was violated when the holding company shares were sold at a public auction by "new" BTNB, without registration of the shares under the Securities Act of 1933 (Harrison Pet. 23). Fifth, petitioner claims that the public

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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auction of unregistered shares constituted a violation of Section 10(b) of the Securities Exchange Act of 1934 and Commission Rule 10b-5 thereunder (Harrison Pet. 24). Sixth, petitioner claims that this alleged violation of the Securities Exchange Act of 1934 rendered void the contract of sale at the auction pursuant to Section 29(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78cc(b) (Harrison Pet. 27-28).

We view petitioner's claims premised on the purported invalidity of the BTNB bank merger as insubstantial for the reasons previously discussed. Petitioner's claims under the Securities Exchange Act of 1934, asserted in a counterclaim as separate causes of action rather than defenses, were not properly presented in state court. Claims based on violations of the Securities Exchange Act of 1934 must be filed in federal court. See Section 27 of the Act, 15 U.S.C. 78aa. As to petitioner's claims of violation of Section 5 of the Securities Act of 1933, we note that Section 12 of the Act, 15 U.S.C. 77*l*, which provides a private remedy for such violations, is available only to purchasers. See also Section 13, 15 U.S.C. 77m, which provides a one year statute of limitations for actions under Section 12(1).

In light of these considerations, we do not believe petitioner's claim that the Supremacy Clause required the Alabama courts to redress breaches of fiduciary duty evidenced by violations of federal securities law raises an issue of sufficient importance, in the context of this case, to warrant review by this Court.